ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

November 9, 2001

Ms. Carol Mitten, Chairperson
District of Columbia Zoning Commission
441 4th Street, NW, Room 210
Washington, DC 20001

Re: *Sua Sponte* Review of BZA Appeal No. 16716
Response of Sunrise Connecticut Avenue Assisted Living, LLC
("Sunrise") to Issues Raised in Connection with *Sua Sponte* Review

Dear Chairperson Mitten and Members of the Commission:

Sunrise, the owner of 5111 Connecticut Avenue, N.W., hereby responds to the Zoning Commission's decision to review BZA Appeal No. 16716 pursuant to its *sua sponte* authority as set forth in 11 DCMR §3128 (BZA Rules of Practice and Procedure). As this Commission is aware, the appeal involved the challenge of a building permit for an assisted living project in Ward 3. The Appellants alleged numerous perceived deficiencies in the permit in support of its appeal. After a lengthy hearing which included extensive expert testimony, the Board concluded that there was absolutely no basis for the revocation of the permit.

In exercising its *sua sponte* authority, the Commission has raised only two narrowly defined issues and has not challenged the vast majority of the Board's conclusions. The two issues are as follows:

1. Whether the Board ruled correctly when it accepted the Zoning Administrator's conclusion that mechanical equipment can be located inside an architectural embellishment.

2. Whether the Board was correct in upholding the building permit although the roof plan had not been referred to the Office of Planning for comment as required by Section 411.10 of the Zoning Regulations.

I. The Board's Decision was Based on Sound Reasoning and Relevant Precedent.

Sunrise fully supports both the Zoning Administrator's and the Board's conclusion that the tower element along the rear roofline of the proposed building constitutes an architectural embellishment designed for the predominant purpose of the architectural uniformity of the roof plan. (See Sunrise's letter dated August 28, 2001, attached as Exhibit A.) The Zoning Regulations historically have been interpreted to preclude the

BZA Case No. 16716 Exhibit No. 42

ZONING COMMISSION
District of Columbia
Case 01-24/16716
Exhibit 4

ZONING COMMISSION
District of Columbia
CASE NO. 01-24
EXHIBIT NO. 4

location of habitable space within an architectural embellishment; however, the regulations do not preclude the location of mechanical equipment in such an embellishment. The subject plans do not present an unusual condition. The Zoning Administrator based his determination on well-established precedent. The Zoning Administrator cited three other recently constructed buildings in downtown Washington in which there is mechanical equipment located inside architectural embellishments. The ample precedent on this issue only strengthens the Zoning Administrator's ruling and demonstrates that the ruling was not unusual or extraordinary in any way.

The ruling was entirely logical given the purpose of the penthouse setback requirement. The requirement is intended to remove equipment from public view. Embellishments, on the other hand, are intended to add design features that are clearly within public view. An embellishment that fully encloses mechanical equipment is entirely consistent with the purposes of the setback requirements because the equipment is fully screened from view and the embellishment is permitted to serve its decorative function.

Finally, the Zoning Administrator's failure to refer the roof plan to the Office of Planning ("OP") pursuant to Section 411.10 of the Regulations clearly constitutes harmless error. For that reason, the Board determined that the lack of a referral was not a basis for granting the appeal. As the Zoning Administrator testified, the practice of referring roof structures to OP was suspended for several years due to OP's inability to handle the requests. Literally thousands of building permits were issued during that time. None of the roof plans associated with those buildings were reviewed by OP. We are not aware of a challenge of any other building permits due to the failure to make the referral. The suggestion that the failure to make the referral for this permit undermines its validity while numerous other permits lack the same referral inappropriately singles out this permit for disparate treatment. Further, as both the Zoning Administrator and Board Chairman noted, DCRA is not bound to respond to any comments received from OP. The review is advisory only, and the fact that it did not occur for this permit, had no effect on the ultimate outcome of the matter.

Courts have long recognized the concept of harmless error. Minor procedural defects in the processing of a building permit or a zoning application typically do not create grounds for the revocation of the permit or the reversal of the decision. (See, for example, Shiflett v. D.C. Board of Appeals and Review, 431 A.2d 9 (1981 D.C.); Glenbrook Road Association v. D.C. Board of Zoning Adjustment, 605 A.2d 22 (1992 D.C.).)

II. The Issues Will Become Moot Through the Issuance of Curative Permit.

The Sunrise project was designed in a manner that is fully consistent with the Zoning Regulations and the past interpretation of those regulations as demonstrated by ample

precedent. Nonetheless, Sunrise is most anxious to avoid further delay while the Zoning Commission grapples with these issues. For that reason, Sunrise has redesigned the roof level of the building to eliminate the tower embellishment. (See the plans attached as Exhibit B.) Further, the equipment that was located in the tower has been greatly reduced in height. As now designed, the equipment is only 18 inches above the surface of the roof and, accordingly, is not subject to the penthouse setback requirements which do not govern rooftop equipment of less than four feet in height. (See Section 411.17.)

DCRA has reviewed the plans and confirmed that they present no zoning issues. Once formally filed with DCRA as a correction to the existing permit, the revised roof plan will be referred to OP pursuant to Section 411.10. As a result, the Commission's two issues will become moot, the continuation of the *sua sponte* review will be unnecessary and this important project can proceed without further delay. We strongly urge the Commission to determine that the Board's Order was correct in all respects and terminate the *sua sponte* review or, in the alternative, order the filing of the "curative" plan to render the issues moot.

In the event that the Commission decides to follow either of these two approaches, Sunrise will forego its opportunity for oral argument that is provided under Section 3128.4(b). Such argument will be unnecessary and would only delay the project further. In the event that the Commission follows a different approach, Sunrise reserves the right to present oral argument.

Respectfully submitted,

Maureen E. Dwyer

Alison C. Prince

Paul A. Tummonds AP

Enclosures

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ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

August 28, 2001

Sheila Cross Reid, Chair
Board of Zoning Adjustment
441 4th Street, NW, Room 210
Washington, D.C. 20001

Re: BZA Appeal No. 16716
Response of Sunrise Connecticut Avenue Assisted Living, LLC, (the "Property Owner") to Memorandum from DCRA to BZA dated August 15, 2001

Dear Chairperson Reid and Members of the Board:

The purpose of this letter is to respond to the memorandum of Olutoye Bello, Chief of the Zoning Review Branch, Office of the Zoning Administrator, dated August 15, 2001. In the memorandum, Mr. Bello addressed the issue of why the tower element that encloses an elevator room is not subject to the setback requirements of Section 400.7(b) of the Zoning Regulations. On behalf of the Property Owner, we fully support Mr. Bello's conclusions in the August 15, 2001 memorandum. Specifically, we support his conclusion that the tower element constitutes an architectural embellishment designed for the predominant purpose of the architectural uniformity of the roof plan. While the Zoning Regulations historically have been interpreted to preclude the location of habitable space within an architectural embellishment, the regulations do not preclude the location of mechanical equipment in such an embellishment. There are numerous examples of embellishments that contain mechanical equipment, some of which were cited in Mr. Bello's memorandum.

Since the purpose of the penthouse setback requirement is to hide equipment from public view and the purpose of an embellishment is to add a design feature that is clearly within the public view, an embellishment that fully encloses mechanical equipment is entirely consistent with the purposes of the setback requirements. The mechanical equipment is fully out of view and the embellishment is permitted to serve its decorative function.

The enclosed drawing clearly shows that the tower feature constitutes an architectural embellishment. It should be noted that the peaked metal roof over the tower is purely decorative and contains no equipment whatsoever and that the building height of 83 feet was measured to the base of the peaked roof.[1]

Mr. Bello also attached to his post-hearing submission, a receipt demonstrating that the property owner submitted the required $2,000 filing fee to the Permit Processing Division on July 10, 2000, the date upon which the building permit was filed. DCRA's acceptance of the filing fee demonstrates that the application was deemed sufficient for filing.

Mr. Bello's memorandum fully clarifies the architectural embellishment issue as well as the sufficiency of the building permit filing. The Appellants have failed to satisfy their burden of proof and the building permit should be upheld.

Very truly yours,

Maureen E. Dwyer

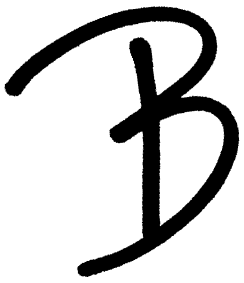
Allison C. Prince

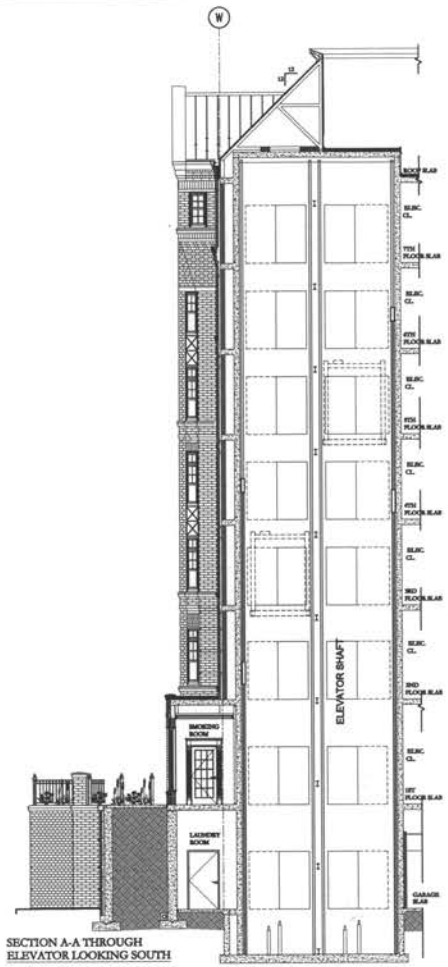
Paul A. Tummonds, Jr.

Enclosure

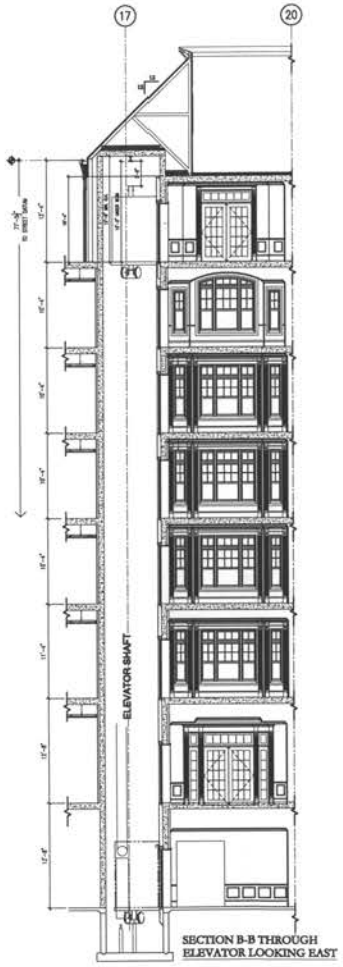
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[1] The Appellants have also argued that the tower constitutes an illegal eighth story. Since the parapet level of the tower is seven feet below the maximum permitted height and since the tower contains only 600 feet of gross floor area, even if it were considered as an eighth story, the building would fully comply with the Zoning Regulations because it would be within the height limit and the maximum permitted FAR. Such a determination is not necessary however, because the tower feature clearly constitutes an architectural embellishment consistent with the other structures on the roof.

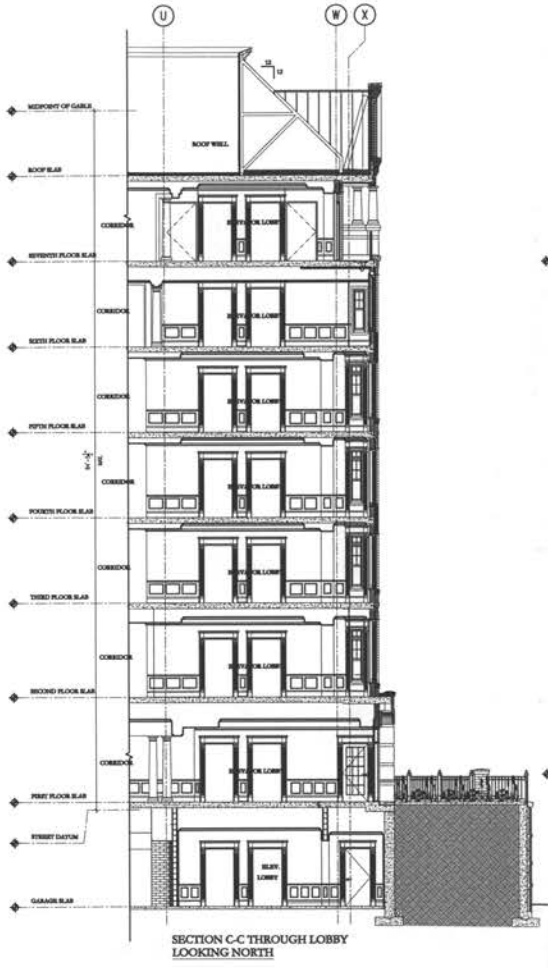




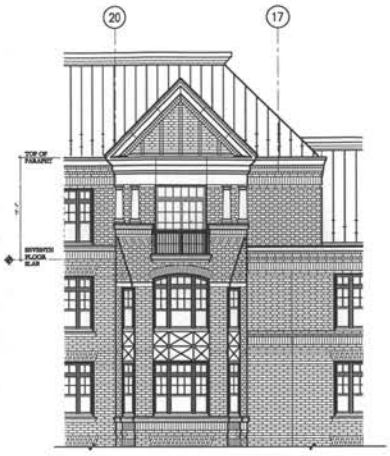
SECTION A-A THROUGH
ELEVATOR LOOKING SOUTH



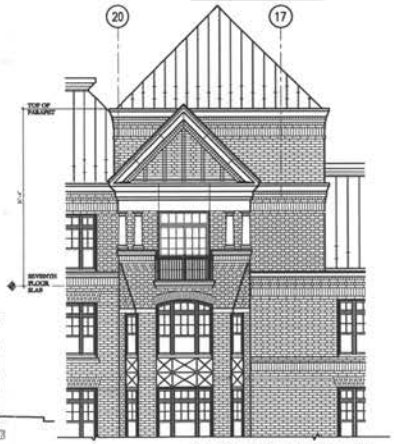
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ELEVATOR LOOKING EAST



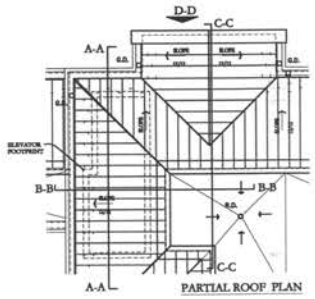
SECTION C-C THROUGH LOBBY
LOOKING NORTH



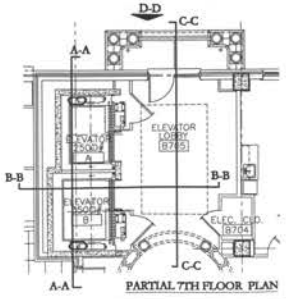
REVISED PARTIAL ELEVATION
"D-D" LOOKING WEST



PREVIOUS PARTIAL ELEVATION
"D-D" LOOKING WEST



PARTIAL ROOF PLAN



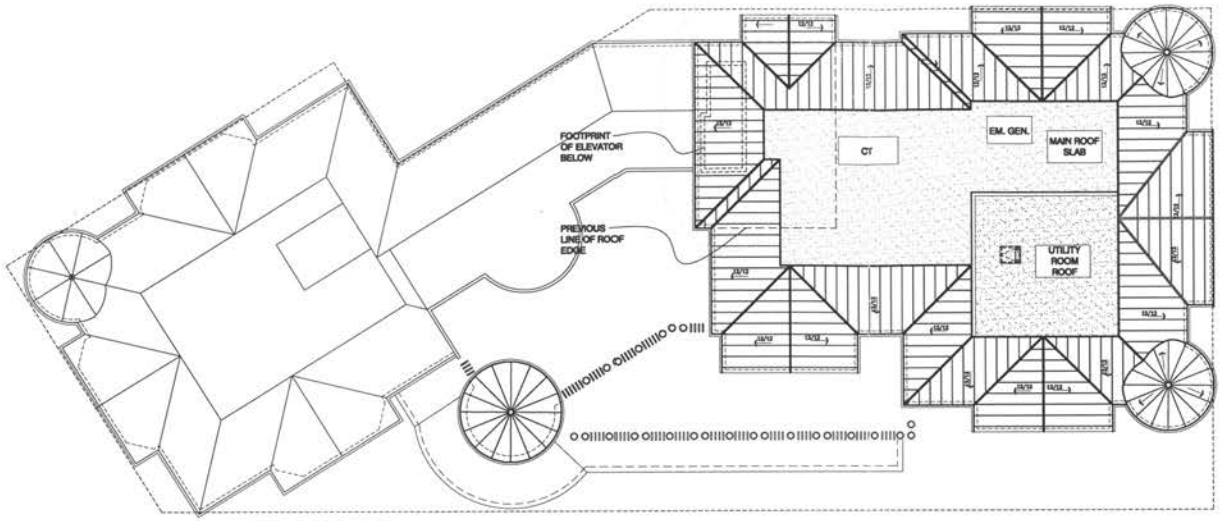
PARTIAL 7TH FLOOR PLAN

ELEVATOR DESIGN CRITERIA

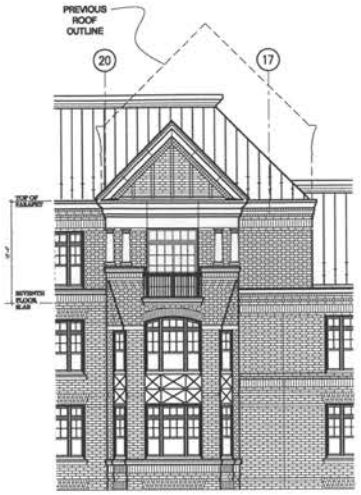
SUNRISE
of Connecticut Avenue, DC

19 October, 2001

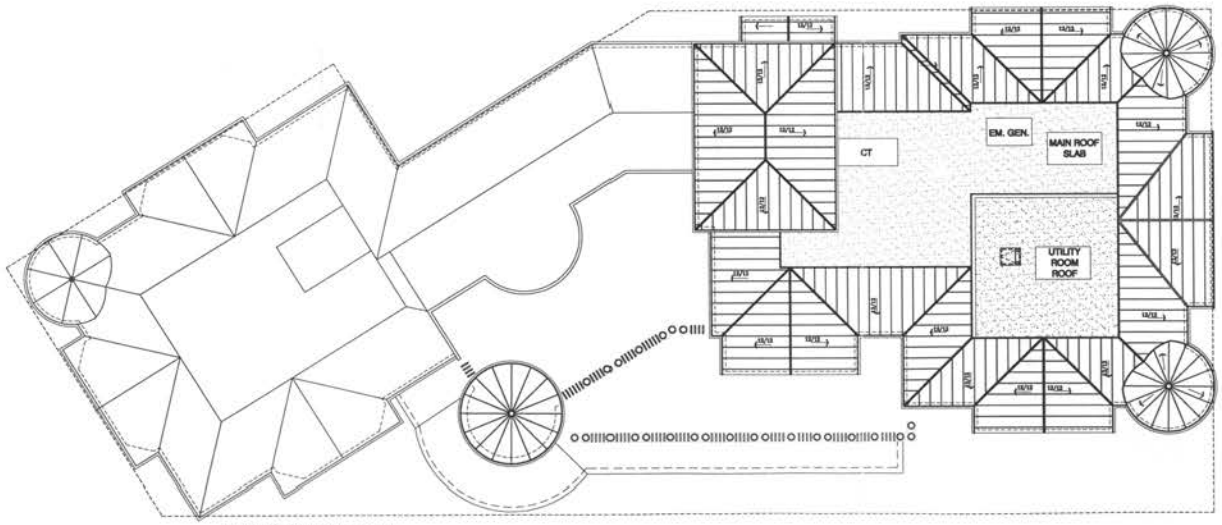
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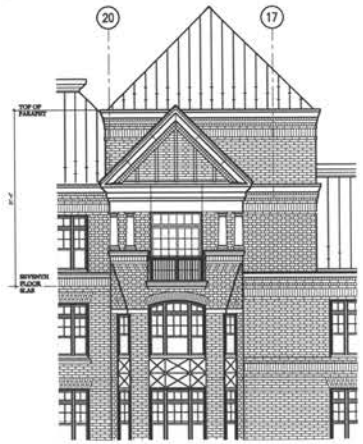
REVISED ROOF PLAN



REVISED PARTIAL ELEVATION
LOOKING WEST



PREVIOUS ROOF PLAN



PREVIOUS PARTIAL ELEVATION
LOOKING WEST

ROOF PLAN COMPARISON

SUNRISE
of Connecticut Avenue, DC

24 October, 2001

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Certificate of Service

I hereby certify that a copy of the foregoing letter regarding Owner's Response to Issues Raised in Connection with *Sua Sponte* Review, was delivered by hand on this 9th day of November, 2001, to the following:

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